

RECEIVED

JUL 13 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

ORIGINAL
FILE

In the Matter of

Review of the Commission's
Regulations and Policies
Affecting Investment
in the Broadcast Industry

)
)
) MM Docket No. 92-51
)
)

TO: The Commission

REPLY COMMENTS OF GENERAL ELECTRIC CAPITAL CORPORATION

Tom W. Davidson
Margaret L. Tobey
Paul S. Pien

Akin, Gump, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036

Its Attorneys

July 13, 1992

No. of Copies rec'd 018
List A B C D E

TABLE OF CONTENTS

SUMMARY	ii
I. INTRODUCTION	1
II. CURRENT COMMISSION POLICIES SKEW THE CREDITOR/DEBTOR RELATIONSHIP AGAINST SECURED CREDITORS	6
III. ALLOWING EXPEDITED APPROVAL OF A TEMPORARY TRANSFER OF CONTROL OR LICENSE ASSIGNMENT TO AN INDEPENDENT TRUSTEE WILL RESTORE THE COMMISSION'S NEUTRALITY IN THE DEBTOR/CREDITOR RELATIONSHIP	9
IV. CONCLUSION	15

SUMMARY

Although a number of commenting parties have supported a change in policy to allow lenders to take security interests in FCC licenses, such action by the Commission will only partially ameliorate the increased risks encountered by lenders making loans to Commission licensees. As a result, such a change in policy alone is not likely to stimulate the needed infusion of capital to the broadcast industry. When a default occurs, the Commission's transfer of control and assignment procedures and requirements can be used to thwart the remedies and protections generally available to lenders in the normal commercial setting and for which they have bargained. As a result, lenders face increased risks in making capital available to the broadcast industry, which have caused lenders either to charge higher interest rates to protect their investments or to leave the vital broadcasting market altogether.

To remedy this situation, the Commission should adopt expedited procedures, similar to its tender offer procedures, providing for the approval of the temporary transfer of a station to an independent trustee in the event of a default. The trustee would be charged with maintaining the status quo pending the orderly disposition of the secured creditor's collateral or the restructuring of the debt. Safeguards similar to those under the tender offer rules would ensure the independence of the trustee. The availability of expedited transfer and assignment procedures will vastly reduce the increased risks associated with making

loans in the broadcast industry by restoring lenders' access to normal default procedures and remedies and will attract much needed capital to the broadcast industry.

RECEIVED

JUL 13 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of the Commission's) MM Docket No. 92-51
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)

TO: The Commission

REPLY COMMENTS OF GENERAL ELECTRIC CAPITAL CORPORATION

General Electric Capital Corporation ("GE Capital"), by its attorneys and in response to the Notice of Proposed Rule Making and Notice of Inquiry ("Notice") released by the Federal Communications Commission (the "Commission" or "FCC") on April 1, 1992, hereby submits its reply comments in the above-captioned proceeding.

I. INTRODUCTION

The Commission's purpose in launching this proceeding is to seek ways to increase the availability of capital (both debt and equity) to broadcasters. Notice, ¶¶ 3, 23. GE Capital, a financial services company, is a major lender serving, among many other industries, the media and communications industries. GE Capital has funded over the past several years more than one billion dollars to companies operating in the entertainment, publishing, broadcasting, and cable television fields. As a result, GE Capital is particularly familiar with the impact of current Commission policies on the availability of capital to Commission licensees.

In its Notice, the Commission requested comment, inter alia, on whether as a matter of law or policy lenders should be allowed to obtain security interests in FCC broadcast licenses and whether the ability to take a security interest in a broadcast license would in fact increase the availability of capital to broadcasters. The opening comments reveal a predictable split of opinion. Broadcasters and unsecured creditors typically oppose a change in the current policy,^{1/} while lenders generally favor a change.^{2/}

In the view of GE Capital, however, a change in policy to allow lenders to take security interests in FCC licenses is not likely, standing alone, to result in a substantial infusion of capital to the broadcast industry. In order for the necessary incentives to exist, the Commission must undertake a thorough examination of the impact of its transfer of control and assignment requirements on lenders facing loan defaults and modify its rules and procedures to enable lenders to effectuate transfers of control and assignments expeditiously and without

^{1/} See, e.g., Comments of Motion Picture Association of America, filed June 12, 1992; Comments of Media Access Project, filed June 12, 1992; Comments of Tak Communications, Inc., filed June 12, 1992.

^{2/} See, e.g., Comments of American Security Bank, filed June 12, 1992; Comments of Media Venture Partners, filed June 12, 1992; Comments of Greyhound Financial Corporation, filed June 12, 1992.

interference by defaulting debtors when foreclosure is indisputably appropriate.^{3/}

As presently applied, the Commission's prior approval and application signature requirements can impede the ability of secured creditors to utilize remedies provided to them in loan documents and in state debtor-creditor laws. In the event of default, a secured creditor typically has a wide range of available remedies, ranging from specific contractual remedies, to self-help measures under the Uniform Commercial Code, to formal judicial foreclosure proceedings. Generally speaking, however, the availability of these measures with respect to a defaulting FCC licensee (or the parent company of such a licensee) is severely limited by the FCC's transfer and assignment policies and procedures. Thus, a lender who wishes to take possession of its collateral and either operate the station or transfer it to a third party in the event of default must obtain the cooperation of the debtor in the preparation and signature of a long form transfer or assignment application. In addition, the lender must defer exercising its remedies until the Commission has approved the application following the statutory 30-day public notice period. Furthermore, the creditor must endure the risk that petitions to deny will be filed, further delaying Commission action on the application.

^{3/} See Comments of General Electric Capital Corporation in response to Petition for Declaratory Ruling filed by Hogan & Hartson on February 21, 1991, at 3 (filed April 22, 1991) (hereinafter referred to as "GE Capital Comments").

A defaulting debtor, on the other hand, can refuse to cooperate with the lender and thereby thwart the exercise of the lender's statutory and contractual remedies. In addition, the debtor can choose to invoke the protection of the federal bankruptcy laws and thereafter can use the Commission's streamlined, after-the-fact, short-form approval process to effectuate a transfer of control of a broadcast licensee to a debtor-in-possession or to a trustee. While it is true that lenders can file involuntary bankruptcy petitions against defaulting debtors and use the same short-form procedures, the resulting bankruptcy proceedings generally are more protective of debtors and indeed may result in an automatic stay of the lender's pursuit of certain other remedies. GE Capital believes that it is unreasonable to limit lenders to the short-form procedures only in the case of bankruptcy or receivership because this policy effectively eliminates the contractual remedies that protect the secured creditor in the non-FCC context and for which it has bargained. This inequity, perhaps more than any other factor, has caused lenders to withdraw substantial capital from the broadcast marketplace. GE Capital's Reply Comments therefore focus on the inequity between secured creditors and debtors that results directly from the requirement of obtaining FCC approval prior to the consummation of the transfer or assignment of a broadcast facility. GE Capital also proposes measures the

Commission should adopt to address the delays and potential abuses that result from these requirements.4/

4/ Although GE Capital's Reply Comments are primarily directed toward the effects of the Commission's prior approval requirements and procedures, GE Capital notes that the present policy of prohibiting lenders from taking a security interest in a license also has the effect of depriving secured creditors of the rights for which they have bargained and paid through financing of broadcast operations. Thus, in Oklahoma City Broadcasting Co., 112 B.R. 425 (Bankr. W.D. Okla. 1990), the bankruptcy court held that because the lender's security interest in all of the assets of a broadcast station did not extend to the debtor's FCC license, the lender's priority over subordinated and unsecured creditors was limited to the amount that could be realized in a liquidation sale of the debtor's assets (absent the license) as opposed to a substantially greater amount equal to the value of the broadcast station sold as a going concern. Whether the difference in the values is attributed to the value of the station as a "going concern" or to the "good will" of the station, a portion, if not all, of the difference in values is attributable to the license.

To remedy this inequitable result, and regardless of whether the Commission determines as a legal matter that lenders may take a security interest in FCC licenses, GE Capital, along with several other commenting parties, urges the Commission to remove any existing restrictions on lenders obtaining security interests in the proceeds of the sale of station assets (including the transfer of the license). See, e.g., Comments of Greyhound Financial Corporation at 18; Comments of Media Venture Partners at 8-9. Allowing lenders to take security interests in the proceeds from the sale of a station's assets regardless of whether the Communications Act is construed to prohibit security interests in FCC licenses will make available to a lender the full value of a station's assets to secure a loan, including its good will and going-concern value. Such a change in the Commission's policy would be consistent with its existing policy of allowing lenders to take security interests in the stock (including the proceeds of a sale of the stock) of a corporate licensee. Moreover, at least one bankruptcy court has held that a lender may take a security interest in the proceeds of the sale of a station's assets. See In re Ridgely Communications, Inc., ____ B.R. ____, Case No. 89-5-1705-JS (Bankr. D.Md. April 15, 1992) (secured lender may properly assert a security interest in the proceeds from the sale of a station); but see Tak Communications, Inc. v. Bank of New England, ____ B.R. ____, Case No. 91-C-935-C (W.D. Wisc. March 23, 1992) (lender may not have a security interest in the proceeds because that would constitute

(continued...)

II. CURRENT COMMISSION POLICIES SKEW THE CREDITOR/DEBTOR RELATIONSHIP AGAINST SECURED CREDITORS

Lenders normally secure loans by a pledge of the borrower's stock and/or a security interest in its assets. In the event the debtor defaults on its obligations, lenders have the rights and remedies set forth under the Uniform Commercial Code ("UCC") (as adopted by the applicable jurisdiction), other state debtor/creditor laws, and the associated loan and security documents.^{5/} A lender's ability to expeditiously exercise its rights upon default by the debtor may be critical to preserving the value of the secured collateral, thus enabling a lender to minimize its losses from an insolvent debtor.

When a broadcast licensee or its parent company defaults under a loan, however, the Commission's requirements for obtaining prior approvals for transfers of control or license assignments skew the creditor/debtor relationship unfairly and unjustifiably against the secured creditor. Unlike ordinary commercial transactions, the FCC's prior approval requirements effectively preclude lenders from exercising their statutory and

^{4/} (...continued)
an impermissible lien on FCC licenses). Moreover, such a clarification would mitigate to some degree the potentially disastrous effect of the Oklahoma City Broadcasting Co. decision on the rights of secured lenders.

^{5/} Under the UCC and typical security documents, for example, the secured lender would have extensive powers over the collateral pledged to secure the loan including the right to take possession of the secured collateral, vote the pledged shares of stock, and sell the collateral at a public or private sale. See generally UCC, Article 9 and specifically sections 9-501, 9-503 and 9-504.

contractual rights against defaulting debtors and foreclosing on the assets and taking over the business, or immediately selling a station as a going concern. Problems arise because, as described below, the procedures for obtaining prior FCC approval unduly delay and jeopardize the ability of lenders to realize on their secured collateral when the debtor is in default.

Transfers of control and assignments of licenses are generally subject to the Commission's 30-day public notice and petition to deny procedures. Often, however, the secured lender can only protect its position by transferring control of the licensee's facilities to itself or to a third party. Expeditious transfer of the station from the control of the defaulting debtor is critical to preserving the value of the collateral. In addition, delay may cause irreversible deterioration of the lender's security since at least some financially troubled stations likely are being mismanaged by the debtor.

The adverse effects of the FCC's prior approval requirement on the ability of lenders to exercise their rights in the event of a default by a debtor are further exacerbated by the Commission's requirement that a transfer application be signed by the debtor-licensee. Thus, the cooperation of the debtor is indispensable to effecting a timely transfer of the station.^{6/}

^{6/} If the broadcaster-debtor refuses to cooperate, the lender must then obtain a court order compelling the debtor's cooperation. If the debtor continues to refuse to cooperate, the lender must return to court to seek a further order appointing a third party to act in the debtor's stead. See, e.g., Arecibo Radio Corporation, 101 F.C.C.2d 545 (1985); Mid-Ohio

(continued...)

In the absence of debtor cooperation, the Commission's current transfer and assignment procedures allow the debtor effectively to thwart the secured creditor's exercise of contractual remedies for which it has bargained and paid, as well as statutory remedies available through the UCC and other state debtor/creditor laws. The debtor can use these requirements to further delay restructuring and, in some situations, to extract significant monetary payments or other concessions from lenders.^{7/}

This use of the Commission's procedures is contrary to the Commission's well-established policy of maintaining neutrality in dealings between Commission licensees and parties with which they have private commercial disputes when such disputes do not involve matters within the Commission's jurisdiction.^{8/} Moreover, the ability of debtors to use the Commission's regulatory procedures to forestall the exercise of legitimate creditor remedies contributes substantially to the reluctance of lenders to make capital available to the broadcast industry. In addition, loans that are made may carry higher interest rates, which are necessary to protect lenders from the

^{6/} (...continued)
Communications, Inc., 90 F.C.C.2d 114 (1982); see also Peace Broadcasting Corp., 36 F.C.C.2d 675 (1975).

^{7/} In its Comments on the Petition for Declaratory Ruling, GE Capital cited one situation in which an uncooperative debtor-licensee was able to delay completion of a workout for almost three years. See GE Capital Comments at 9, n.5.

^{8/} See Tender Offers and Proxy Contests, Policy Statement, 59 R.R.2d 1536 (1986) ("Tender Offer Policy Statement").

greater risks inherent in broadcast lending. This result clearly disserves the public interest and should be remedied. As one possible solution to this problem, GE Capital proposes that the Commission adopt new regulations that would expedite approval of the temporary transfer of a station to an independent trustee if the loan documents so provide. A discussion of GE Capital's proposal follows.^{9/}

III. ALLOWING EXPEDITED APPROVAL OF A TEMPORARY TRANSFER OF CONTROL OR LICENSE ASSIGNMENT TO AN INDEPENDENT TRUSTEE WILL RESTORE THE COMMISSION'S NEUTRALITY IN THE DEBTOR/CREDITOR RELATIONSHIP

The typical provisions in security agreements delineating the rights of lenders in the event of a borrower's default often entitle the secured creditor to appoint a trustee

^{9/} GE Capital's proposal is consistent with the proposal suggested by BTMI, Inc. ("BTMI"). In its Comments, BTMI urged the Commission to create a mechanism which would allow lenders, upon default by a licensee, to apply for involuntary transfer of a station to a third party trustee or holding company. Such third party would then sell the station for the benefit of the lender and other secured and unsecured creditors. According to BTMI, such a mechanism would facilitate the disposition of the station without resort to lengthy state or federal litigation and the problems attendant to preserving the value of collateral where a station is no longer financially viable. See Comments of BTMI at 7.

In its Comments on the Petition for Declaratory Ruling, GE Capital urged the Commission to acknowledge the problems caused by its transfer and assignment requirements and procedures in the defaulting debtor context and to initiate a rulemaking proceeding addressing this problem. See GE Capital Comments at 10-13. GE Capital proposed expanding the Commission's definition of "legal disability" as a possible solution to this problem. GE Capital believes that the solution proposed herein represents a more modest departure from existing Commission policies and therefore may be less controversial and more easily implemented. However, it may be appropriate for the Commission to adopt a Further Notice of Proposed Rulemaking to consider both of these proposals.

to oversee the operations of a defaulting debtor and to conduct a private or public sale of the debtor's business or assets.^{10/} Such provisions are intended to enable a lender to preserve the value of its collateral during the period required to complete a sale or to work out a voluntary or consensual restructuring with the defaulting debtor. For the reasons discussed above, however, where the defaulting party is an FCC licensee, such a remedy is rendered meaningless due to the FCC's prior approval requirements. Thus, current Commission policy requires prior long-form approval of the transfer of control or assignment of the license to the trustee, even if such a transfer were temporary and the trustee were independent. Such approval also requires either the cooperation of the licensee or extensive judicial proceedings. Moreover, even if the debtor were willing to cooperate, the time required to obtain the FCC's approval largely negates the lender's ability to effectuate the remedy, i.e., transfer of the lender's security to a third party charged with preserving its value and disposing of the collateral in accordance with the terms of the applicable underlying security agreements. Accordingly, despite the Commission's desire to remain neutral in non-FCC matters, the Commission's current policies and procedures work to the detriment of secured creditors.

^{10/} The authority of such a trustee would arise from the contractual relationship between the creditor and debtor, as contrasted with a trustee or receiver appointed as a result of a judicial bankruptcy or foreclosure proceeding.

To remedy this situation, GE Capital urges the Commission to adopt procedures allowing for the expedited approval of the transfer of a licensee or licensee's assets to an independent trustee pursuant to the express terms of the security agreement between the lender and the licensee. Such procedures would be analogous to the Commission's expedited procedures for the appointment of an independent trustee to accept the tender of stock in a tender offer.^{11/} Under the proposed procedures, in situations where security documents provide for the transfer of a defaulting licensee's assets to a trustee, a lender, either in cooperation with the licensee or independently (i.e., without the signature of the debtor if the debtor refused to cooperate), would be allowed to submit a "short form" application for the FCC's approval of the temporary transfer of control of the license from the defaulting licensee to an independent trustee. Compliance with the full long-form prior approval requirements would be required for any subsequent transfer of the station from the trustee to a new purchaser.

The authority of the trustee would be limited to that of a "temporary conservator or caretaker charged with preserving the nature and character" of the station in order to facilitate the orderly disposition of the assets or restructuring of the

^{11/} See Tender Offer Policy Statement, ¶¶ 34-71. The authority of the Commission to grant such a temporary transfer would also be based on its authority to grant special temporary authority under Section 309(f) of the Communications Act.

debt.12/ In other words, the trustee's authority would be limited to maintaining the status quo. Thus, the trustee would be prohibited from undertaking any significant departures from existing station operations or practices.13/

The proposed trustee would be required to be "independent" as set forth under the Tender Offer Policy Statement -- that is the trustee must be an independent person with no familial or business relationship with the beneficiary or the grantor. Similarly, the trust agreement would be required to contain provisions sufficient to insure the required insulation between the trustee and the lender with respect to the day-to-day operation and control of the station. Such insulation would include restrictions on communications between the lender and the trustee regarding station management and operation similar to those set forth under the Policy Statement.14/

The Commission's review of the application would be limited to:

12/ As several parties have stated in this proceeding, when a debtor-licensee defaults, lenders generally have neither the inclination, nor the desire, to take control of a station. See, e.g., Comments of BTMI, Inc. at 5-6; Comments of American Security Bank at 6. Rather, lenders simply wish to take measures to ensure that the value of the collateral is preserved to the maximum extent possible.

13/ See Tender Offer Policy Statement, ¶¶ 66-71.

14/ Thus, the lender would be prohibited from becoming involved in, or seeking to influence, directly or indirectly, the operation or management of the station. See Tender Offer Policy Statement, ¶¶ 62-65. However, the insulation requirements should not apply to the rights of the secured creditor under the governing loan documents to participate in foreclosure proceedings or other disposition of the assets.

1. The proposed trustee's independence and basic qualifications;
2. Confirmation that the underlying security documents provide for the appointment of an independent trustee upon default; and
3. Confirmation that the trust provisions meet the applicable requirements with respect to the required insulation and restrictions on communications between the lender and the trustee.

If the Commission's review of the application satisfied these limited requirements, the Commission would authorize the temporary transfer of control of the station licensee to the trustee.

Importantly, such FCC authorization would not automatically require the transfer of control of the station licensee to the trustee. Rather, the Commission's approval would simply neutralize the impact of the FCC's processes on the workout of the loan. Thus, a lender could obtain the required FCC approval for the transfer of control of a station licensee to the trustee on an expedited basis in advance of, or concurrently with other procedures undertaken to remedy the alleged default, ranging from voluntary restructuring to judicial foreclosure proceedings.

Just as with transfers of control in the ordinary course of business, however, the ability to consummate the transfer would be subject to the rights of the debtor and creditor under the governing contracts and state creditor/debtor

laws.^{15/} Accordingly, the lender's rights vis-a-vis the defaulting licensee (including whether the licensee was actually in default) ultimately would be determined through the processes applicable to normal creditor/debtor relationships.^{16/} Thus, a lender who proceeds to transfer a defaulting licensee's station to an independent trustee would do so subject to the outcome of these further procedures. Similarly, an alleged defaulting licensee would have the traditional panoply of procedures available for contesting a creditor's assertion of default remedies, including recourse to state court proceedings to contest the creditor's invocation of the trustee provision of the contract.

The advantage of this approach is that it neutralizes the detrimental effect of the FCC's current procedures in the workout/foreclosure process by allowing secured creditors to fully utilize the statutory and contractual protections for which they have bargained. At the same time, however, the FCC would not be placed in the position of itself having to adjudicate the propriety of the creditor's exercise of its rights. Instead, as

^{15/} Once such a transfer has been consummated, however, the trustee should be afforded sufficient time to arrange for the sale of the assets in an orderly fashion that will ensure that the rights of all parties, including the debtor and the unsecured creditors, are protected.

^{16/} Indeed, a lender may be disinclined to transfer control of a broadcast licensee to the independent trustee, preferring instead to negotiate an acceptable workout with the debtor. The availability of procedures for expediting prior FCC approval for the transfer of a station to such a trustee, however, would increase the likelihood that lenders will be able to obtain the cooperation of debtors in structuring voluntary workouts.

in analogous situations involving competing rights, the Commission would neither hinder nor encourage a particular outcome, but rather would assist in the effectuation of an outcome determined through judicial or other processes.

IV. CONCLUSION

The Commission has recognized that the broadcasting industry badly needs an infusion of both debt and equity capital. Although there are risks inherent in both types of investments, the Commission's current policies and procedures make those risks unacceptably and unnecessarily high for many lenders. Fortunately, these policies and procedures can be altered in very narrow and focused ways, as outlined in these reply comments, to reduce these risks and to encourage lenders to make more capital available to broadcasters. Such action would benefit the borrowers, the lenders, and the public interest by permitting needed upgrading of existing broadcast facilities and by facilitating the sales of stations to purchasers who have

demonstrated a strong desire to own and operate a broadcast station.

Respectfully submitted,

GENERAL ELECTRIC CAPITAL CORPORATION

By: Margaret L. Tobey
Tom W. Davidson
Margaret L. Tobey
Paul S. Pien

Akin, Gump, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036

Its Attorneys

July 13, 1992

CERTIFICATE OF SERVICE

I, Rachel T. Barksdale, hereby certify that a copy of the foregoing Reply Comments of General Electric Capital Corporation has been sent by hand delivery to the following on this 13th day of July, 1992:

The Honorable Alfred C. Sikes
Chairman, Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554


The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Sherrie P. Marshall
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

The Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Roy J. Stewart, Esquire
Chief
Mass Media Bureau
1919 M Street, N.W.
Room 314
Washington, D.C. 20554


Rachel T. Barksdale